



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

FEB - 5 2014

Andy Zabel, Executive Director
North Dakota Democratic Party-NPL Party
1902 E. Divide Avenue
Bismarck, N.D. 58501

Re: MUR 6680
Representative Rick Berg,
Berg for Senate and Kelly J. Zander,
in his official capacity as Treasurer
714 Partners LLP
Dr. Jim Frisk
James Wieland
Bradley S. Williams

Dear Mr. Zabel:

This is in reference to the complaint you filed with the Federal Election Commission ("Commission") on October 31, 2012, concerning allegations that Representative Rick Berg, Berg for Senate and Kelly J. Zander in his official capacity as treasurer, 714 Partners LLP, Dr. Jim Frisk, James Wieland and Bradley S. Williams had violated certain provisions of the Federal Election Campaign Act of 1971, as amended (the "Act"). After considering the information provided in the complaint, the responses and the circumstances of this matter, the Commission determined to dismiss this matter and closed the file on January 28, 2014. The Factual and Legal Analysis, which more fully explains the basis for the Commission's decision is enclosed.

Documents related to the case will be placed on the public record within 30 days. See Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70,426 (Dec. 18, 2003) and Statement of Policy Regarding Placing First General Counsel's Reports on the Public Record, 74 Fed. Reg. 66132 (Dec. 14, 2009).

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Mr. Andy Zabel
MUR 6680 (Berg)

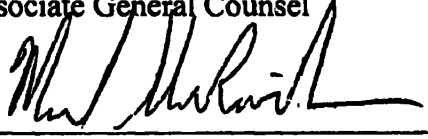
The Federal Election Campaign Act of 1971, as amended, allows a complainant to seek judicial review of the Commission's dismissal of this action. *See* 2 U.S.C. § 437g(a)(8).

If you have any questions, please contact me at (202) 694-1650.

Sincerely,

Daniel A. Petalas
Associate General Counsel

BY:


Mark D. Shonkwiler
Assistant General Counsel

Enclosure
Factual and Legal Analysis

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FEDERAL ELECTION COMMISSION

FACTUAL AND LEGAL ANALYSIS

RESPONDENTS: Congressman Rick Berg,
Berg for Senate and Kelly J. Zander,
in his official capacity as Treasurer
714 Partners LLP
Dr. Jim Frisk
James Wieland
Bradley S. Williams

MUR: 6680

I. INTRODUCTION

The Complaint alleges that Congressman Berg used a private plane owned by his partnership, 714 Partners LLP ("714 LLP"), for trips related to his 2012 Senate campaign without the Committee paying for, or disclosing, the flights to the Commission. Compl. at 2-5. As a result, the Complaint alleges that Berg's principal campaign committee, Berg for Senate, violated 2 U.S.C. §§ 441a(f) and 434(b) by accepting excessive contributions and failing to report them and that 714 LLP and Berg's partners violated 2 U.S.C. § 441a(a)(1)(A) by making excessive contributions to Berg for Senate. *Id.* at 4-5.

Berg for Senate and 714 LLP submitted a response denying the allegations, asserting that Berg was a joint owner of the 714 LLP plane and that Berg for Senate properly paid for Berg's use of the plane in accordance with "the normal business practices of 714 LLP." Resp. at 2-4 (Dec. 13, 2012).¹ Respondents also contend that the Committee properly reported its disbursements for the flights and did not exceed Berg's proportional share of use under the partnership's ownership agreements. *Id.* at 2, 4.

¹ The Committee and 714 LLP submitted a joint response on December 13, 2012. On January 29, 2013, the four partners of 714 LLP — Rick Berg, Bradley Williams, James Wieland, and Jim Frisk — submitted a separate response incorporating the response previously filed by the Committee and 714 LLP. All references to this response refer to the response filed on December 13.

Based on the available information and the circumstances presented here, the Commission concludes that further enforcement action would not be an efficient use of the Commission's resources, and dismisses this matter pursuant to its prosecutorial discretion.

II. FACTUAL AND LEGAL ANALYSIS

A. Background

In 2012, then-Congressman Rick Berg was the Republican candidate for North Dakota's open Senate seat, and Berg for Senate and Kelly J. Zander in his official capacity as treasurer ("the Committee") was his principal campaign committee. Respondents state that, prior to and during his candidacy, Berg held a one-fourth partnership interest in 714 LLP, an entity which owns a private plane. Resp. at 2.² Dr. Jim Frick, James Wieland, and Bradley Williams owned the remaining partnership interests. *Id.* According to the Respondents, the 714 LLP ownership agreement requires each partner to pay hourly fees to 714 LLP for use of the plane. *Id.* Further, Red River Aero, a charter company, maintains the plane and each partner pays Red River Aero for pilot time and fuel when using the plane. *Id.* Red River Aero's business practice is to issue separate quarterly invoices to each partner for the hourly fees owed to 714 LLP and the pilot time and fuel costs owed to Red River Aero. *Id.* Respondents concede that Berg used the plane for campaign travel and explain that when he did so, Red River Aero sent invoices directly to the Committee. *Id.* at 2, 4. The Committee asserts that it obtained certifications from each partner before each campaign-related flight that the flight would not cause Berg to exceed his proportional share of use under the partnership agreement. *Id.* at 4. The Response includes a

² Berg was also a partner in Wheelberg Partners LLP ("Wheelberg"), another entity that owns a private plane used by Berg. *Id.* None of the flights that are the subject of the complaint's allegations appear to have been on the Wheelberg plane, although the Committee's disclosure reports show that the Committee disbursed funds to Wheelberg for travel during the campaign. According to the Committee, Wheelberg used the same charter company to maintain the plane (Red River Aero) and payment structure to collect fees for use of the plane (quarterly invoices for hourly fees, fuel, and pilot time). See discussion *infra*, discussing payment procedures used by 714 LLP.

1 blank copy of the certification form that each partner purportedly completed prior to each flight.
2 Resp. at Attach. 1, but does not includes any completed certifications for the flights at issue nor a
3 copy of the ownership agreement setting forth the proportional use shares assigned to each
4 partner.

5 The Complaint identifies 13 flights between June and September that it alleges Berg took
6 on the 714 LLP aircraft. Compl. at 2. As to the first two alleged flights (flights #1 and #2), the
7 Complaint states that Berg took two campaign-related flights on June 23 from Fargo, North
8 Dakota, to Grand Forks, North Dakota, and back to attend a parade in Grafton, North Dakota.
9 *Id.* To support its allegation, Complainant provides a link to a Facebook page that shows photos
10 of Berg at a parade in Grafton; the webpage, however, does not appear to provide any
11 information about the form of transportation that Berg used to travel to the location. *See id.* at 2,
12 n. 5. The Complaint also provides a link to what appears to be the flight history of an aircraft
13 registered to 714 LLP. *See id.* at 2, n 4. While the website includes flights on the dates
14 identified in the Complaint, the source of the aircraft's flight history is unclear and there is no
15 information linking Berg to the listed flights. *Id.* In response, the Committee describes the
16 allegation that Berg used the aircraft on June 23, 2012 as "inaccurate" but provides no further
17 information about how Berg traveled to the event. Resp. at 4, n 2.

18 As to the alleged flights on June 30 (flights #3 and #4) identified in the Complaint, the
19 Respondents represent that the Committee was properly invoiced for the flights and reimbursed
20 714 LLP and Red River Aero on July 11, 2012. *Id.* at 4. The Committee points to its October
21 2012 Quarterly report. *Id.* In addition to the sole \$1,261.74 disbursement to 714 LLP noted in
22 the complaint, the Committee disclosed a \$3,856.43 disbursement to "Red River Aero" for travel

1 on the 714 LLP airplane between April 1 and June 30. *See* Berg for Senate Oct. 2012 Quarterly
2 Report (filed 10/15/12).

3 As to the remaining alleged flights (flights #5-#13), the Respondents also represent that
4 the Committee was properly invoiced and made payments on October 18, 2012, to 714 LLP and
5 Red River Aero. *Resp.* at 4. The Committee's Post-General Report (filed 12/6/12), includes
6 disbursements to 714 LLP (for hourly fees) and Red River Aero (for pilot time and fuel) for
7 travel by the Committee between July 1 and September 30.³ The Committee also submitted
8 corresponding travel invoices dated October 6, 2012, which show charges for flights during this
9 period, including flights that appear to match flights #5 through #13. *See* Attach. 1. The
10 Committee also provided copies of two duplicate checks showing payment of each invoice on
11 October 18, 2012, 12 days after the date of the invoices. *See* Attach. 2.

12 The chart below summarizes the Committee's disbursements and disclosure information
13 for each of the flights alleged in the complaint.

³ Respondents state that Red River Aero and 714 LLP billed the Committee on a quarterly basis, per its normal practices. *See Resp.* at 2. The quarterly invoice for the travel that occurred from July 1 through September 30, *i.e.* flights #5 through #13, was dated October 6, and the Committee reportedly paid the invoice on October 18. Thus, the payments properly fell in the time frame covered by the Post-General Report (19th day before election through the 20th day after the election, *i.e.* October 18 through November 26, 2012). *See* 2 U.S.C. § 434(a)(2)(i)-(iii). The Complainant's review of the Committee's disclosure reports was necessarily limited to the Committee's 2012 July and October Quarterly Reports (which the complaint refers to as the "June and September Quarterly Reports," respectively) and did not include the Post-General Report because the complaint was filed on October 30.

Campaign-Related Travel on 714 LLP Plane Alleged in Complaint

Flight #	Flight Date	Destination	714 LLP Invoice Amount (Date Billed)	Red River Aero Invoice Amount (Date Billed)	Total Paid	Date Paid	Disclosure Report
1	June 23	Grand Forks	N/A ⁴	N/A	N/A	N/A	N/A
2	June 23	Fargo	N/A	N/A	N/A	N/A	N/A
3	June 30	Dickinson	\$1,261.74 (July 11) ⁵	\$3,856.43 (July 11)	\$5,118.17	July 25	October Quarterly (filed 10/15/12)
4	June 30	Fargo					
5	July 3	Bismarck	\$2,281.56 (Oct. 6)	\$4,254.04 (Oct. 6)	\$6,535.60 ⁶	Oct. 18	Post-General (filed 12/6/12)
6	July 4	Fargo					
7	Aug. 14	Bismarck					
8	Aug. 14	Minot					
9	Aug. 23	Fargo					
10	Aug. 23	Bismarck					
11	Sept. 29	Fargo					
12	Sept. 29	Minot					
13	Sept. 29	Fargo					

B. Analysis

The Complaint alleges that the Committee violated the Act when it accepted, and failed to disclose, excessive in-kind contributions in the form of free travel for Berg on the 774 LLP plane. The Complaint asserts that Berg took at least thirteen trips on the plane between June 23 and September 29, 2012, but the Committee disclosed only a single disbursement to 714 LLP in the amount of \$1,261.75 on July 25, 2012. Compl. at 2-3. The Complaint concludes, therefore, that the Committee failed to pay for its multiple uses of the plane. *Id.* at 5.

⁴ See *supra* p. 4.

⁵ The Committee did not provide a copy of the July 11 invoice with its response, but it summarized its contents in the response. See Resp. at 4. Presumably, the amounts included in the invoice covered multiple flights in addition to the two cited in the complaint. See also fn. 12 *infra*.

⁶ The Committee's invoices and disclosure reports also show additional flights that were not mentioned in the complaint. The quarterly invoice from 714 LLP to the Committee shows that the Committee was billed for eight additional flights during that quarter for travel on the following dates: July 27, August 8, 9, 16, 20, 21, September 18 and 22. There are corresponding charges from Red River Aero for each of these flights.

1 Section 439a(c) of the Federal Election Campaign Act of 1971, as amended ("the Act"),
2 restricts the use of campaign funds for flights on noncommercial aircraft and specifies payment
3 and reimbursement requirements for noncommercial flights that the Act does permit. Generally,
4 a Senate candidate, or the authorized committee of a Senate candidate, may not make
5 expenditures for flights on noncommercial aircraft, unless the candidate or committee pays to the
6 owner, lessee, or other person who provides the airplane, "the pro rata share of the fair market
7 value of the flight."⁷ 2 U.S.C. § 439a(c)(1)(B). The payment must be made within a
8 commercially reasonable time after the date on which the flight is taken, *see id.*, which
9 Commission regulation define as seven days after the first day of the flight. 11 C.F.R.
10 § 100.93(c).

11 The Act, however, also provides an exception to these payment rules for flights on an
12 aircraft owned or leased by the candidate or an immediate family member of the candidate, "so
13 long as the candidate does not use the aircraft more than the candidate's or immediate family
14 member's proportionate share of ownership allows." 2 U.S.C. § 439a(c)(3). Specifically, when
15 a candidate travels on an aircraft that is owned or leased by that candidate under a shared-
16 ownership or other time-share arrangement, and the travel does not exceed the candidate's
17 proportionate share of the ownership interest in the aircraft, the candidate's authorized committee
18 pays the "hourly, mileage, or other applicable rate charged the candidate . . . for the costs of
19 travel."⁸ 11 C.F.R. § 100.93(g)(1)(i). The Commission has not specified a time period for

⁷ The Act provides that the "pro rata share" is "determined by dividing the fair market value of the normal and usual charter fare or rental charge for a comparable plane of comparable size by the number of candidates on the flight." 2 U.S.C. § 439a(c)(1)(B).

⁸ If, however, the candidate's use of the aircraft exceeds his proportional share of ownership interest, the exception to the payment rules is not available and the candidate must pay the fair market value of the flight within seven days, as set forth in 2 U.S.C. § 439a(c)(1)(B) and its corresponding regulation, 11 C.F.R. § 100.93(c). *See discussion supra* (specifying payment requirements of 2 U.S.C. § 439a(c)(1)(B) and 11 C.F.R. § 100.93(c)). A "proportional share of the ownership interest" in an aircraft means the amount of use to which the candidate or immediate family member is entitled under an ownership or lease agreement. 11 C.F.R. § 100.93(g)(3).

1 repayment, "in expectation that . . . the candidate will make the repayment in accordance with
2 the normal business practices of the entity administering the shared-ownership or lease
3 agreements. If not, that entity will be deemed to have made a loan to the candidate's committee
4 that would . . . become an in-kind contribution to the candidate's authorized committee, subject
5 to the limits, prohibitions, and reporting requirements of the Act."⁹ Campaign Travel
6 Explanation and Justification, 74 Fed. Reg. 63951, 63962 (Dec. 7, 2009). Prior to each flight,
7 the candidate's committee must obtain a certification from the service provider that the
8 candidate's planned use of the aircraft will not exceed the candidate's proportional share of use
9 under the ownership or lease agreement.¹⁰ 11 C.F.R. § 100.93(g)(3).

10 Section 439a(c)(3) applies when a candidate does not exceed his share of use of a plane
11 pursuant to an applicable partnership agreement. The Response asserts that the Committee was
12 invoiced and paid for costs related to the use of the 714 LLP plane for campaign travel in a
13 manner consistent with the customary business practice of the partnership and service provider,
14 and the Committee timely reported those payments as disbursements on its disclosure reports.
15 See 2 U.S.C. §§ 439a(c)(3), 434(b).

⁹ The Act defines a "contribution" as "any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office." 2 U.S.C. § 431(8)(A)(i). The term "anything of value" includes "all in-kind contributions," such as "the provision of any goods or services without charge or at a charge that is less than the usual and normal charge for such goods or services." 11 C.F.R. § 100.52(d)(1). If goods or services are provided at less than the usual and normal charge, the amount of the in-kind contribution is the difference between the usual and normal charge for the goods or services and the amount charged the political committee. *Id.* All contributions by individuals to candidates and authorized committees are subject to the limitations set forth in 2 U.S.C. § 441a(a)(1)(a), which during the 2012 election cycle, limited contributions to \$2,500 per election. See also 11 C.F.R. § 110.1(e). Additionally, the Act requires a candidate's authorized committee to disclose all receipts and disbursements to the Commission. 2 U.S.C. § 434(a)-(b).

¹⁰ "Service provider" in the context of a jointly-owned plane is the person who makes the plane available to the campaign traveler. 11 C.F.R. § 100.93(a)(3)(ii).

1 The Committee's disclosure reports and other records provided by the Respondents
2 indicate that the Committee paid \$11,653.77 for the campaign-related flights alleged in the
3 Complaint, payments that appear to have been timely disclosed. *See supra* fn. 5. Although the
4 Commission was not presented with the signed certificates or partnership agreements setting
5 forth the respective use shares assigned to each partner, even if it were determined that the
6 Committee nevertheless might have exceeded Berg's proportional ownership interest of the 714
7 LLP aircraft, the amount in violation would likely be *de minimis*.

8 For these reasons, the Commission exercises its prosecutorial discretion to dismiss this
9 matter. *See Heckler v. Chaney*, 470 U.S. 821 (1985).